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STAPLES & STAPLES, Inc. v. HERVEY.

June 15, 1922.

[112 S. E. 607.]

Master and Servant (§ 70 (2)*)—Salesman's Contract for Guaranteed Salary and Expenses Chargeable against Commissions Construed.—Where a salesman's contract provided that he should receive a stated amount per month as guaranteed salary, to be charged to his account and deducted on settlement for commissions, and that the employer would advance funds for traveling expenses, which were to be applied against commissions and deducted when making settlements, and would make settlements for commissions where they exceeded advancements, held, that the employer was under obligation to pay the guaranteed salary without reference to the amount of commissions, and to advance traveling expenses, limited to the amount of commissions which were actually earned.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 384.]

Error to Law and Equity Court of City of Richmond.

Action by R. H. Hervey against Staples & Staples, Inc. From a judgment for plaintiff, defendant brings error. Affirmed.

R. Grayson Dashiell, of Richmond, for plaintiff in error.

A. H. Sands, of Richmond, for defendant in error.

BRAGG v. COMMONWEALTH.

June 15, 1922.

[112 S. E. 609.]

1. Indictment and Information (§ 125 (3)*)—Indictment Held to Charge Merely the Unlawful Sale of Ardent Spirits, and Not Two Offenses.—Indictment charging that defendant "did unlawfully sell ardent spirits, to wit, flavoring extracts, for beverage purposes," held to charge merely the unlawful sale of ardent spirits as against contention that it charged two distinct offenses, the selling of ardent spirits and the selling of flavoring extracts for beverage purposes, the words "to wit, flavoring extracts, for beverage purposes," being simply descriptive of the kind of liquor sold.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 436.]

2. Indictment and Information (§ 125 (2)*)—Two Offenses against Liquor Law May Be Charged in One Count.—Two offenses in violation of the prohibition law may be charged in one count of the indictment.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 437.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

3. Criminal Law (§ 1167 (3)*)—Refusal to Strike Part of Bill of Particulars Held Not Ground for Reversal.—In prosecution for the unlawful sale of ardent spirits, the court's refusal to strike out portion of bill of particulars, alleging that named persons who had purchased the liquor from defendant were men of intemperate habits, held not ground for reversal, since the purchasers could have been shown to be men of intemperate habits, even though the words complained of had been stricken from the bill of particulars.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 382.]

4. Intoxicating Liquors (§ 224*)—Commonwealth Required to Prove the Liquor Sold to Be Intoxicating.—In prosecution for the unlawful sale of ardent spirits, in which it was claimed that defendant had sold flavoring extracts for beverage purposes, the burden was on the commonwealth to prove that the liquor sold was intoxicating, either by analysis thereof or by facts and circumstances.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 33.]

5. Intoxicating Liquors (§ 232*)—In Prosecution for Sale of Ardent Spirits, Commonwealth Could Prove Purchasers Men of Intemperate Habits.—In prosecution for unlawful sale of ardent spirits, in which it was claimed that defendant had sold flavoring extracts for beverage purposes, the state could prove that purchasers were men of intemperate habits.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 36.]

6. Intoxicating Liquors (§ 134*)—"Ardent Spirits" Defined.—"Ardent spirits," within the prohibition act, includes any liquor which will affect the manner, muscular movement, general appearance, or behavior of any person who drinks a sufficient amount thereof, so as to make such effect apparent, in view of Laws 1918, c. 388, §§ 1, 49, 58.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Ardent Spirits. For other cases, see 8 Va.-W. Va. Enc. Dig. 4.]

7. Intoxicating Liquors (§ 134*)—"Intoxicated" and "Drunk" Are Synonymous.—The words "intoxicated" and "drunk" are synonymous.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Drunk; Intoxicated—Intoxication. For other cases, see 7 Va.-W. Va. Enc. Dig. 4.]

8. Criminal Law (§ 1159 (2)*)—Appellate Court Will Not Grant New Trial, unless Evidence Was Plainly Insufficient to Warrant Finding.—Under Code 1919, § 6363, a new trial will not be granted on appeal for insufficiency of evidence, unless it was plainly insufficient to warrant the verdict.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 90.]

9. Intoxicating Liquors (§ 238 (5)*)—In Prosecution for Unlawful Sale of Ardent Spirits, Evidence Held Sufficient to Go to Jury.—In

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

prosecution for the unlawful sale of ardent spirits, in which it was claimed that defendant sold flavoring extracts for beverage purposes, evidence held sufficient for submission of the case to the jury.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 151.]

Error to Circuit Court, Alleghany County.

T. H. Bragg was convicted of violating the prohibition law, and he brings error. Affirmed.

Geo. A. Revercomb and *R. C. Stokes*, both of Covington, for plaintiff in error.

John R. Saunders, *Atty. Gen.*, for the Commonwealth.

WAY v. BAYDUSH.

June 15, 1922.

[112 S. E. 611.]

1. Frauds, Statute of (§ 159*)—Where There Is Doubt Whether an Oral Promise Is to Answer for the Debt of Another, the Matter Is for the Jury; Otherwise for the Court.—Where there is any doubt whether the oral promise relied on was an original promise, or one to answer for the debt or default of another within the statute, it is for the jury to determine in view of the surrounding facts and circumstances, but if there is no such doubt, the matter is for the court.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 519.]

2. Frauds, Statute of (§ 17*)—Whether Oral Promise to Pay Is Independent of a Promise to Answer for Another Does Not Depend Solely on the Form of Expression.—Whether an oral promise to pay is an independent promise, or a promise to answer for the debt or default of another, does not depend altogether on the form of expression, but largely upon the parties' situation and whether they understood it to be a collateral or direct promise.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 519.]

3. Trial (§ 194 (9)*)—Instructing that Oral Promise Was to Pay Another's Debt Was Error Where Conflicting Evidence Made a Jury Question.—Where owner, urging subcontractor to perform, said, "If it is money trouble you are hanging back on, you go ahead and finish that work, and look to me for the pay," held, that the conflicting evidence presented questions whether this was an independent oral promise or a collateral promise within the statute of frauds to answer for the contractor's debt, and it was error to instruct that the promise was one to pay another's debt.

[Ed. Note.—For other cases, see 6 Va.-W. Va. Enc. Dig. 519.]

4. Frauds, Statute of (§ 160*)—Instruction as to Promise to An-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.